IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-127

CARMEN ACS, Administratrix of the Estate of Santiago Lazaro, Deceased,

Appellant,

vs.

RICHARD BRADY,

Appellee.

On Appeal From The Indiana State Supreme Court

JURISDICTIONAL STATEMENT

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INTRODUCTION

The appellant herein respectfully appeals from an adverse judgment below in the Supreme Court of Indiana, rehearing denied May 3, 1976. This jurisdictional statement is submitted to show that the United States Supreme Court has jurisdiction of this appeal and that this appeal presents

a federal question which is substantial. Accordingly, it is urged that this Court note probable jurisdiction and consider the issues presented after a briefing on the merits in that this appeal both presents issues which are of cardinal importance to each of the "Several States of this Union," and presents issues which represent a significant current topic in tort law regarding the administration of accident compensation law throughout our country as evidenced by the frequency with which the constitutional question has arisen and the disagreement among the highest courts of the "Several States." As argued by the United States Court of Appeals for the Seventh Circuit on June 1, 1976 in *Sidle* v. *Majors*, ... F. 2d .... (7th Cir. 1976), 52 Ind. Dec. 630 (attached as Exhibit C), because the highest state courts are in a quandary over this issue here presented, this Court should give a plenary consideration to the issues here presented.

OPINIONS BELOW

The opinion from which this appeal is taken is *Acs* v. *Brady*, ... Ind. ....., 342 N.E. 2d 837 (1976) which is attached hereto as Exhibit A and which is based entirely on the court's decision in *Dempsey* v. *Leonherdt*, ... Ind. ....., 341 N.E. 2d 763 (1976), which is also attached hereto as Exhibit B.

JURISDICTION

The instant suit is one to enjoin the enforcement of Indiana's Guest Statute as unconstitutional since the Supreme Court of Indiana, in defiance of the rulings in the supreme courts of its neighboring states of Michigan, Ohio and Kentucky, and of the states of California, Kansas, Idaho, New Mexico, Nevada and North Dakota, specifically declared its Guest Statute to be free of any infirmities under the United States Constitution.

The judgment of the Indiana Supreme Court was entered on March 4, 1976, and rehearing was denied on May 3, 1976. Notice of Appeal was timely filed on May 18, 1976, with the Supreme Court of Indiana.

The jurisdiction of the United States Supreme Court to hear this appeal rests upon 28 U.S.C., Section 1257(2).

Since appellant believes that there is no conceivable question as to this Court's jurisdiction, no cases are here cited as to jurisdiction.

STATUTE INVOLVED

GUEST OF OWNER OR OPERATOR—RIGHT TO DAMAGES.—The owner, operator, or person responsible for the operation of a motor vehicle shall not be liable for loss or damage arising from injuries to or death of a guest, while being transported without payment therefor, in or about such motor vehicle, resulting from the operation thereof, unless such injuries or death are caused by the wanton or wilful misconduct of such operator, owner, or person responsible for the operation of such motor vehicle. I.C. 9-3-3-1, Ind. Stat. Ann., Section 47-1021 (Burns' Code Ed.)

QUESTIONS PRESENTED

The basic question at issue herein is the constitutionality of the Indiana Guest Statute. However, the issue is actually much broader, and can be stated: whether most recently the Supreme Courts of California, Kansas, Idaho, New Mexico, Nevada, North Dakota, Ohio and Michigan are correct, and the Guest Statutes as enacted across the United States are unconstitutional as depriving citizens of federally protected rights, or whether most recently the Supreme Courts of Alabama, Arkansas, Utah, Colorado, Iowa, Delaware, Nebraska, Oregon, South Dakota and Washington are correct, and the Guest Statutes do not deprive citizens of federally protected rights. There is a further question of whether or not a guarantee of federal constitutional protection should depend upon which state one happens to be travelling through. With respect to the Indiana decision itself, which attacks the American jurisprudential system, there is a deeper issue of whether this Court should allow to stand a decision and opinion which declares the use of the courts evil and demeans the American jury system by intimating that jurors are Robin Hoods and that it would be a rational purpose to protect insurance companies from jurors by prohibiting access to the courts by the injured or maimed.

STATEMENT OF THE CASE

Plaintiff, Carmen Acs, brought an action for the death of Santiago Lazaro, who was killed by defendant, Richard

Brady, when he drove his vehicle at a high rate of speed into the rear of a tractor-trailer on Interstate 80. The accident happened within the borders of Indiana, and Indiana's Guest Statute came into play because decedent was found in the passenger seat of defendant's vehicle, even though there was no evidence of the exact relationship between the decedent and the defendant, with the defendant having amnesia and his only passenger being dead. Prior to trial, plaintiff filed a motion for a pre-trial determination of the constitutionality of the Guest Statute which was held to be unconstitutional and in violation of both the state and the federal constitutions. Defendant appealed to the Indiana Supreme Court which reversed the lower court's decision and held the statute to be constitutional and not violative of the due process and equal protection guarantees of the United States Constitution.

THE QUESTIONS ARE SUBSTANTIAL

The issues raised in this appeal are of national significance and warrant a plenary consideration on the merits in that (1) there has been a significant socio-economic factual change together with an evolution of the constitutional doctrines and tests applied, since this Court last ruled on a similar issue as the one here presented in *Silver* v. *Silver*, 280 U.S. 117 (1929); (2) the twenty (20) states which have decided the issue here presented in the last two and one half years are in conflict in interpreting the United States Constitution and are in a quandary as to this federal question; (3) the opinion of the Indiana Supreme Court with its attack on the American system of jurisprudence cannot

be allowed to stand as precedent in our country; (4) the plaintiff-appellant has a meritorious argument as to the unconstitutionality of the Guest Statute; and (5) the issue has national significance, and the courts across this land are crying for a plenary decision by this Court.

Approximately one-half of the "Several States" of this Union enacted Guest Statutes "during depression years to help the prevailing economic plight of the insurance companies that lobbied for their passage." *Sidle* v. *Majors*, ... Fed. 2d ..... (7th Cir. 1976), 52 Ind. Dec. 630, 635. In 1929 this Court passed upon the constitutionality of the Connecticut Guest Statute in *Silver, supra,* thereby recognizing that the issues presented were federally substantial. That decision should no longer be controlling as to the issue raised herein, nor should it be controlling as to the issues decided at that time. First of all, "*Silver* focused on whether the Connecticut Statute could properly apply to motor vehicles as distinguished from other forms of transportation. The opinion did not consider whether the statute discriminated against a class of plaintiffs (280 U.S. at 123) and therefore is distinguishable." *Majors* at 634. Secondly, if there ever was a substantial and rational relation between the classes created by the Guest Statute in 1929, they have now been eroded by an alteration of the relevant factual premises upon which they were based. Thirdly, there has been a significant change in the due process and equal protection tests developed by this Court since *Silver*, and the "rule of that case *(Silver)* has been so eroded by subsequent decisions (see e.g., *Vlandis* v. *Kline*, 412 U.S. 441) that it should no longer control under the Equal Protection Clause." *Majors* at 634. On the basis of these arguments, within the last two and one half years the highest courts

of eight (8) states have declared their respective Guest Statutes to be unconstitutional under the Fourteenth Amendment to the United States Constitution. The Seventh Circuit United States Court of Appeals has also agreed with these decisions and stated:

> "Their persuasive reasoning reinforces our belief that *Silver* is no longer to be followed." *Majors* at 634.

Silver considered only the rationality of requiring payment in automobiles and not in other vehicles. It did not consider or discuss the rational connection between the fact of payment and the purposes of the Statute. *Silver* at 123. Also, it did not consider whether the classification between vehicle passengers who were guests and other vehicle passengers was a permissible classification.

With respect to the factual premises existing at the time of *Silver, Majors* states:

> "As with the Indiana decision here, the *Silver* ruling relies on the notion that it is unfair to impose liability on the host and the fear that the courts will be inundated with troublesome lawsuits. At that time two factors supported the Supreme Court's decision to defer to the legislature's judgment on these questions. Widespread automobile use was still new and society needed time to develop methods of assessing the cost of the inevitable injuries. When the guest statutes are viewed as an initial attempt to cope with the problem, it was entirely proper for the Court to let the legislature make the decision. However, that is no longer the case. Liability insurance is a means by which the cost is borne by motorists as a class, not the individual driver. Further, experience teaches us that no fewer suits are filed by virtue of such statutes. The premises of *Silver* v. *Silver* being no longer valid in the light of modern authority, we believe that on plenary review the Supreme Court would not hold that *Silver* controls the

question before us. See *Brown* v. *Board of Education*, 347 U.S. 483, 493-494." *Majors* at 634.

The social and economic conditions which existed during the time of the passage of these Statutes, the depression era, obviously differ greatly from today. Not only was the automobile a unique means of transportation at that time, but the existence of liability insurance has greatly increased since that time. Behavior patterns and public thinking about gratuitous passengers have changed in the years since *Silver* as mentioned by one professor:

> "Most people accept free transportation as frequently as they provide it for others. No longer can it be said, therefore, that the average guest passenger is getting 'something for nothing.' Prevailing behavior patterns dictates that he should reciprocate when he is able to do so by offering rides to others." Gibson, *Guest Passenger Discrimination*, 6 Alberta L. Rev. 211 at 213.

The guest statutes are clearly no longer experimental legislation, and should now be evaluated on their performance. *Manistee Bank and Trust Co.* v. *McGowan*, 394 Mich. 655, 232 N.W. 2d 636, 643 (1975). In 1929 there may have been a problem with a quick rise in "vexatious suits," *Silver* at 123, because of a novel means of transportation and the injuries which would necessarily arise therefrom, *Majors* at 634; however, in 1976, experience disproves such a rationale as shown by the repeal of this type of legislation in a number of states including Connecticut in 1937, and most recently, Washington in 1975 and as shown by the attack on the rationality by the eight states which have recently declared the legislation to be unconstitutional.

Even though *Silver* did not consider the rational connection between payment and the purposes of the legisla-

tion, if it would have found that there was a rational connection there, this Court has recognized that what once might have been rational because of certain factual premises may lose that rationality as the facts are altered by changing conditions within the society. *Chastleton Corp.* v. *Sinclair*, 284 U.S. 543 (1924); *Brown* v. *Board of Education*, 347 U.S. 483 (1954). In *Sinclair*, Justice Holmes, speaking for the Court, declared that:

> "A law depending upon the existence of an emergency or other certain state of facts to uphold it may cause to operate if the emergency ceases or the facts change even though valid when passed." *Sinclair* at 547-48.

This Court in *Nashville, Chattanooga & St. L. Ry.* v. *Walters*, 294 U.S. 405 (1951) held that a statute valid as to one set of facts may be invalid as to another, and a statute valid when enacted may become invalid by changing conditions to which it is applied. When reviewing an old decision by this Court on an old statute, this Court will consider new facts and changing circumstances as this Court stated in *Leary* v. *United States*, 395 U.S. 6 (1969):

> "A statute based upon a legislative declaration of facts is subject to constitutional attack on the ground that the facts no longer exist; in ruling upon such a challenge a Court must, of course, be free to re-examine the factual declaration." *Leary* at 37.

Since *Silver* there has been a new formulation of equal protection tests developed by this Court. *Silver* was not decided on the basis of a "fair and substantial" relation test developed in *Reed* v. *Reed*, 404 U.S. 71 (1971), nor was it decided with a consideration of a compelling state interest test developed in *Shapiro* v. *Thompson*, 394 U.S. 68 (1969). Furthermore, *Silver* was not considered on the basis of a due process attack at all, let alone the new for-

mulation on those grounds adopted in *Vlandis* v. *Kline,* 412 U.S. 441 (1973).

It was argued to the Indiana Supreme Court that the Guest Statute impinged upon fundamental rights which would require the statute to meet the compelling state interest standard. The state court specifically rejected the use of the compelling state interest standard. The Guest Statute takes away from citizens the right of access to the courts for negligently inflicted injury. Such a right is a fundamental right and central to the notion of equal protection. See for example, *Barbier* v. *Connolly,* 113 U.S. 27 (1885) where this Court stated that the Fourteenth Amendment was intended to insure:

> "That all persons . . . should have like access to the courts of the country for the protection of their persons and property, and the prevention and redress of wrongs, and the enforcement of contracts . . ." *Barbier* at 31.

The fundamental character of the right to have a judicial redress for negligently inflicted harm was also stressed in *Chambers* v. *Baltimore and Ohio Railroad,* 207 U.S. 142 (1907) where the Court stated:

> "The right to sue and defend in the courts is the alternative of force. In an organized society, it is the right conservative of all other rights, and lies at the foundation of orderly government. It is one of the highest and most essential privileges of citizenship . . ." *Chambers* at 148.

The Indiana Supreme Court has stated that the use of the courts is evil and would have citizens return to jousting and force to settle their grievances with respect to negligent injuries inflicted upon one citizen by another. Clearly access to the courts for injury done is a fundamental right

grounded in the First Amendment's right to petition as stated by this Court in *California Motor Transport Co.* v. *Trucking Unlimited,* 404 U.S. 508 (1972) where this Court stated:

> "The right to petition extends to all departments of the Government. The right of access to the courts is indeed but one aspect of the right to petition." *Trucking Unlimited* at 510.

See also *Brotherhood of Railroad Trainmen* v. *Virginia ex rel. Virginia State Bar,* 377 U.S. 1 (1964) and *United Transportation Union* v. *State Bar of Michigan,* 401 U.S. 576 (1970) where this Court ruled to protect the First Amendment right of access so individuals could seek judicial redress for injuries negligently inflicted. Furthermore, this Court has also indicated that a state must show a "substantial regulatory interest" designed to prevent "substantial evils" before the access right may be restricted. *NAACP* v. *Button,* 371 U.S. 415, 444 (1963). Clearly a fundamental right is here involved, and the compelling state interest equal protection standard should be employed.

Also, the Guest Statute, it may be argued, infringes upon the fundamental right of a citizen to travel. *Shapiro, supra.* A substantial question exists as to whether Guest Statutes which deny individuals protection from negligently inflicted injuries because they do not pay for their travel, impinges upon the rights of members of that class to freely travel in interstate commerce. Citizens who must travel unprotected may be deterred in their travel just as much as the residenciary requirements deterred travel in *Shapiro, supra.*

Even though it is submitted that the compelling state interest standard should have been employed in this instance,

it is further submitted that the Guest Statute is not supported by any rational legislative purpose. Speaking to the Indiana Guest Statute, the Seventh Circuit Court of Appeals has stated:

> "We can find no necessary rational relation to a legitimate state interest (*Reed* v. *Reed,* 404 U.S. 71, 75, 76) that would require us to sustain the legislation." *Majors* at 635.

The Supreme Court of Indiana has found three (3) purposes for the Guest Statute to which the Seventh Circuit has stated the following:

> "In its opinion responding to our certification, the Indiana Supreme Court stated that the purpose of this statute was to foster 'hospitality by insulating generous drivers from lawsuits instituted by ungrateful guests and the elimination of the possibility of collusive lawsuits.' 341 N.E. 2d at 768. However, as noted in *Brown* v. *Merlo,* 8 Cal. 3d 855, 506 P. 2d 212 (1973), where the California guest statute was held unconstitutional under the Fourteenth Amendment, widespread liability insurance has eliminated any notion of ingratitude that may have formerly adhered to a suit by a guest against his host. 506 P. 2d 221-222. 80 to 85% of Indiana residents carry liability insurance (United States Department of Transportation, Driver Behavior and Accident Involvement: Implications for Tort Liability, at 205 (1970), whereas only 20% of all Americans were insured at the time of the passage of most of the guest statutes. Ellsberre and Roberts, Compulsory Insurance Against Motor Vehicle Accidents, 76 U.Pa.L.Rev. 690, 691 (1928). Indiana automobile owners have also had the benefit of a compulsory Financial Responsibility Law since 1947 (Ind. Code 9-2-1-15 (Burns' 1973)). *Brown* also punctured the so-called anti-collusion purpose of a guest statute, for the guest and host can escape the bar of the statute by colluding

on the issue of whether the rider provided any compensation for the ride (506 P. 2d 226-227) or whether the host was guilty of wilful or wanton misconduct. Such odius perjury, often difficult to disprove, is encouraged by guest statutes. Nor is vexatious litigation avoided, for complaints are readily drafted to meet the statutory requirements. Thus we agree with the California Supreme Court in *Brown* (506 P. 2d 225-227) that the relationship between the legitimate goal, the prevention of fraudulent actions, and the remedy, denying guests the right to sue, is so attenuated that it is unreasonable to eliminate causes of action of an entire class of persons merely because an indefinite portion of a designated class may file fraudulent suits. See *Cleveland Bd. of Ed.* v. *LaFleur,* 414 U.S. 632, 655-657 (Powell, J., concurring).

One further reason the Indiana Supreme Court advanced in favor of the constitutionality of the guest statute was that otherwise there might be an escalation of automobile liability insurance premiums. But when the Guest Act was enacted in Connecticut in 1927, there was no reduction in automobile premiums, nor was there an increase in the premiums when the statute was repealed ten years later. Note, 42 U.Cinn.L.Rev. 709, 721 (1972). Defendant has not demonstrated that our invalidation of this statute would increase premiums for such insurance." *Majors* at 632, 633.

With respect to the rational connection test, the ultimate question then is whether the relation between the classification and the purposes is reasonable. There is no rational relation between payment for a ride and hospitality. There is no principle in our legal scheme which dictates that one must pay for the right of protection from negligently inflicted injury. The classification fails not because it draws some distinction between paying and non-paying guests, but because it penalizes non-paying guests by depriving

them completely of protection from ordinary negligence. The loss of life or limb of a guest should not become less worthy of compensation merely because he has not paid for his ride. "No matter how laudable a state's interest is in promoting hospitality, it is irrational to reward generosity by allowing the host to abandon ordinary care and by denying to non-paying guests the common law remedy for negligently inflicted injury." *McGeehan* v. *Bunch,* 88 N.M. 308, 540 Pacific 2d 238, 241 (1975). It is questionable whether the protection against ingratitude or the promotion of hospitality is a permissible state interest at all. See *McGeehan* at 242. It has been suggested that it is none of the state's business what kind of virtuous emotions the citizenry either feels or fails to feel.

With respect to the collusion rationale for the statute, the Supreme Court of Michigan in *Manistee, supra,* spoke directly to this point and stated:

> "There may indeed be incentive for collusion where the injured person is a friend or relative. However, to deprive the entire class of guest passengers of protection against negligently inflicted injury or death because some members of the class may be friends and relatives and a collusive lawsuit may be brought presents a classic case of an impermissibly overinclusive classification scheme, that is, a scheme in which a statute's classification 'imposes a burden upon a wider range of individuals than are included in a class of those tainted with the mischief at which the law aims.'
>
> Not infrequently the defendant driver is hostile to the plaintiff guest passenger and offers evidence in opposition to recovery. In other cases he has no evidence to offer—he may be dead. In any such case, collusion is but a remote possibility.
>
> Assuming that some drivers are willing falsely to admit negligence to enable some of their guests to recover against their insurance companies, they might be as willing falsely to admit gross negligence.

That, there are other protections against the perceived evil of collusion between friendly litigants has been recognized by a number of states, including Michigan, which have abolished interspousal intra-family immunity.

Friends and acquaintances of the litigants are the most frequent witnesses in almost every case. We depend upon the judicial process to sort out non-meritorious claims.

Witnesses are subject to rigorous examination before the trial. Those who testify falsely run the risk of penalties for perjury. In most personal injury cases, the insurance company represents the insured and will vigorously defend against liability. Insurance policies usually require the insured to cooperate with his insuror.

> Conceding arguendo, that there is a higher risk of collusion in guest passenger cases, it is disproportionate, and therefore unreasonable, to bar recovery in the large generality of cases (where collusion is not present or will not succeed) to forestall a few successful frauds." *Manistee* at 643-44.

The third purpose of the guest statute which the Indiana Supreme Court proposed was the protection of insurance companies purpose. This purpose was based upon the unfounded assumptions that (1) the guest statute lowers insurance premiums, (2) jurors are Robin Hoods, and (3) the presence of the Guest Statute lowers the amount of litigation between hosts and guests. These assumptions have been shown invalid, and with respect to the protection of the insurance company argument, the Supreme Court of Michigan also spoke by stating:

"Another 'possible reason' for the guest statute has been suggested 'in the purse of the motor owning public.' The argument is that guest passenger statutes limit liability and reduce litigation, thereby allowing insurance companies to offer coverage at lower rates.

The guest passenger statute may have reduced the number of recoveries, but whether it has reduced litigation is not clear.

Plaintiffs, defendants, and their insurors expend considerable time and money litigating whether plaintiff was a guest being transported in a motor vehicle and if so, whether his injuries were caused by gross negligence or wilful and wanton misconduct.

Conceding, *arguendo* that insurance rates are lower because there is a guest statute, lower insurance premiums do not, without more, justify an essentially arbitrary classification.

If persons injured on Thursdays or men between 50 and 60 years of age were denied recovery for ordinary negligence, there would be assurance of less litigation, fewer recoveries, and the possibility of lower insurance rates. Nevertheless, all would agree that such classifications would be struck down as 'arbitrary' despite the relief afforded the 'purse of the motor owning public.'

It may be legitimate for the legislature to intervene in the increasing costs of automobile insurance. But the means selected by the legislature to do so must be reasonably related to the object sought to be attained. Denying guest passengers recovery for ordinary negligence is no more reasonably related to the objective of lower insurance rates than would be denying recovery to persons injured on Thursdays or men between 50 and 60 years of age.

Guest passengers as a class are not better able to bear the cost of lower premiums for the motor owning public. As a class, they are not necessarily all

wealthy nor do they necessarily all have especial sources of recovery. Those who do not have other sources of recovery are forced to exhaust their own resources and may become public charges." *Manistee* at 645-46.

The Supreme Court of Indiana also rejected the argument that the Guest Statute violated the Due Process Clause of the Fourteenth Amendment, and that specifically it failed to meet the irrebutable presumption due process test developed in *Stanley* v. *Illinois,* 405 U.S. 645 (1972), *Vlandis* v. *Kline, supra* and *Cleveland Board of Education* v. *LaFleur,* 414 U.S. 642 (1974). The Guest Statute creates an irrebutable presumption that every "guest case" will lower the quantum of hospitality in the state, will involve collusion, and will raise insurance premiums. The Supreme Court of Indiana refused to apply the irrebutable presumption test stating that it found *Vlandis, supra,* "difficult to interpret." *Dempsey* at 771. In applying the irrebutable presumption due process test, to the issue at hand, the Supreme Court of Ohio in *Primes* v. *Tyler,* 43 Ohio St. 2d 195, 331 N.E. 2d 723 (1973), stated:

"We find further that the guest statute imposes, in effect, an 'irrebutable presumption' that a lawsuit filed by any nonpaying guest is fraudulent or collusive or lowers the quantum of hospitality in this state, when that presumption is not necessarily or universally true in fact. In *Vlandis* v. *Kline* (1973), 412 U.S. 441, a similar irrebutable presumption was imposed against Connecticut college students who, after entering college as 'non-residents' were presumed to remain non-residents while enrolled. In fact, many students became Connecticut residents while students, but the statute precluded a change in status. One of the three reasons proffered by the state to justify the presumption was fraud prevention: '. . . Without the collusive presump-

tion it would be almost impossible to prevent out-of-state students from claiming a Connecticut residence merely to obtain the lower (tuition) rates.' *Ibid.* at 451. The court struck down the presumption as an obvious denial of due process."

"We find that the compelling logic of *Vlandis* v. *Kline* applies with equal force to this case. The guest statute conclusively precludes a 'remedy by due course of law' (Section 2, Article I of the Ohio Constitution) to injured persons even though evils statutorily assumed to exist may not obtain." *Primes* at 728.

In *Vlandis,* Connecticut had a statute which raised an irrebutable presumption that students living outside the state who filed their applications to attend Connecticut schools would never come to Connecticut with the intention to become residents. This irrebutable presumption was invalid in that it included in this class those who came with the intention of becoming bona fide residents. This Court stated that there were alternative means to achieve the ends of equalizing educational costs between residents and non-residents, and that the statute's irrebutable presumption violated due process. In the guest statute situation, there are alternative means instead of the above stated irrebutable presumptions, to accomplish any purposes stated for the Guest Statute which means are short of wholly denying access to the courts to a class for negligently inflicted injury. With respect to the hospitality purpose, the legislation could be drawn to apply to the case where, in fact, hospitality on the part of the driver was a motivating purpose for the guest relationship, e.g., in Illinois the Guest Statute is limited only to hitch-hikers. With respect to collusion prevention, there are more reasonable means to prevent collusion, e.g., cross-examination, pre-trial discovery, perjury laws and faith in juries. With respect to the

protection of insurance companies purpose, the alternative means to protect against Robin Hood juries could be a wide latitude in voir dire of jurors, the court's power to enter a judgment notwithstanding the verdict, and the court's power to strike down excess verdicts, all of which are reasonable alternatives to the absolute denial of access to the courts to a class for negligent injury.

It is submitted that this court should not only exercise plenary jurisdiction over this appeal because of the merits of appellants' arguments, but also because the opinion and decisions of the Indiana Supreme Court concerning the Guest Statute should not be allowed to stand as precedent in that they intimate that jurors are Robin Hoods, they debase the American jurisprudential system in that they label the use of the courts "evil" and label the protection of insurance companies as a rational purpose when weighed against the denial of redress for negligently inflicted injury.

It is further submitted that this appeal presents a substantial federal question because of the aforementioned conflicts between the states on the question here presented. Just prior to Indiana's decision two (2) bordering states, Michigan and Ohio, whose socio-economic milieu compares with that of Indiana, reached directly opposite results from the Indiana Supreme Court in interpreting the very same provisions of the United States Constitution. It is submitted that whether or not a citizen receives federal Constitution protection should not depend on which state the citizen happens to be travelling through. The very fact that in the last two and one-half years eight (8) states have interpreted the United States Constitution as prohibiting Guest Acts and ten (10) states have ruled that the Guest

Statute does not contravene the United States Constitution, in itself, supports the conclusion the issue presented is a substantial federal question.

Now an untenable situation exists in that the protection of the United States Constitution depends on which State a person happens to be travelling through. Unless this Court will now step in and decide these issues on the merits, the confusion as to constitutionally protected rights will not be resolved. This Court has realized that a conflict between different courts, which have no means of resolution without this Court, is sufficient reason to decide the merits of the case. *Avco Corp.* v. *Aero Lodge,* 735, 390 U.S. 557, 559 (1968); *Northwestern National Bank* v. *United States,* 387 U.S. 213, 217 (1967). Not only have the courts differed as to the extent of federally guaranteed rights, but also they have differed as to the standards of review and tests to be applied. Such conflicts will continue until this Court decides the merits of these issues.

CONCLUSION

The concluding sentence in the *Majors* opinion summarizes the cry for a plenary determination by this Court, stating:

> "The frequency with which the question has arisen and the disagreement among the courts attest to the importance of the issue, its difficulty and the need for conclusive resolution so that the present viability of *Silver* v. *Silver* can be authoritatively determined." *Majors* at 636.

Respectfully submitted,

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EXHIBIT A

SIDLE v. *MAJORS*
Cite as 341 N.E.2d 763

Tracy SIDLE, Plaintiff-Appellant,

v.

William C. MAJORS, Defendant-Appellee.

Joe DEMPSEY, Defendant-Appellant,

v.

Diana LEONHERDT (Green), Plaintiff-Appellee.

Nos. 475S96, 275S42.

Supreme Court of Indiana.

Feb. 16, 1976.

Rehearing Denied April 9, 1976.

On certified question from the United States Court of Appeals for the Seventh Circuit as to whether the guest statute contravened provisions of the Indiana Constitution, and on appeal from the Circuit Court, Benton County, R. Perry Shipman, J., which also raised issue of constitutionality of the guest statute, the Supreme Court, Prentice, J., held that guest statute bears a fair and substantial relationship to purposes of fostering hospitality and eliminating possibility of collusive lawsuits and does not violate the equal protection clause of the Fourteenth Amendment; and that the statute does not contravene provisions of Indiana Constitution that every man, for injury done to him, shall have remedy by due course of law and that General Assembly shall not grant to any citizen privileges or immunities which shall not equally belong to all citizens.

(Exhibit A)

Judgment of trial court reversed and cause remanded.

Certified question answered.

Arterburn, J., filed concurring opinion.

1. *Constitutional Law*—70.3(4, 6)

Court has no right to substitute its convictions as to the desirability or wisdom of legislation for those of elected representatives.

2. *Constitutional Law*—81

Courts are under a constitutional mandate to limit the General Assembly to its lawful territory by prohibiting legislation which, although enacted under the claim of valid exercise of the police power, is unreasonable and oppressive.

3. *Constitutional Law*—48(1)

Every statute stands clothed with presumption of constitutionality, and such presumption continues until clearly overcome by a showing to the contrary.

4. *Constitutional Law*—48(1, 3)

Burden is upon the challenger to overcome presumption of constitutionality of every statute, and all doubts are resolved against his charge.

5. *Common Law*—11

States may abolish or modify the common-law subject to requirement that manner and effect of abolition not violate any relevant constitutional constraints.

6. *Constitutional Law*—82

"Fundamental rights" are those which have their origin in the express terms of the Constitution or which are necessarily to be implied from those terms.

See publication Words and Phrases for other judicial constructions and definitions.

(Exhibit A)

7. *Constitutional Law*—48(4), 321

Right to bring action for common-law negligence is not a "fundamental" right and burden was not on proponent of constitutionality of the guest statute to show a compelling state interest justifying the legislative classification. Const. art. 1, § 12; IC 1971, 9-3-3-1.

8. *Constitutional Law*—209

The equal protection provisions of the State and Federal Constitutions are designed to prevent the distribution of extraordinary benefits or burdens to any group. Const. art. 1, § 23; U.S.C.A.Const. Amend. 14.

9. *Constitutional Law*—213.1(2)

If neither a fundamental right nor a suspect classification is involved in challenge to statute on equal protection grounds, the standard of review is that the classification not be arbitrary or unreasonable and that a fair and substantial relationship exists between the classification and the purpose of the legislation creating it. Const. art. 1, §23; U.S.C.A.Const. Amend. 14.

10. *Automobiles*—181(1)

Purposes of the guest statute are the fostering of hospitality by insulating generous drivers from lawsuits instituted by ungrateful guests and the elimination of possibility of collusive lawsuits. IC 1971, 9-3-3-1.

11. *Constitutional Law*—70.1(11)

Although doctrines of interspousal immunity, charitable immunity, and governmental immunity were judicially created and therefore were subject to judicial repeal when, in the court's opinion, they were determined to be no longer compatible in society, the immunity granted host drivers against negligent claims of guest passengers was made by the legislature and court is not at liberty to abolish it upon the same considerations. IC 1971, 9-3-3-1.

(Exhibit A)

12. *Constitutional Law*—38

It is no constitutional infirmity that a statute may not operate to perfection, if it may reasonably be expected to operate effectively.

13. *Automobiles*—181(1)

Constitutional Law—208(1)

Fact that automobile guest statute is overbroad in that guest passengers with bona fide damage claims are caught in the same net as those with collusive and fraudulent claims does not render classification arbitrary or unreasonable. IC 1971, 9-3-3-1; Const. art. 1, § 23; U.S.C.A.Const. Amend. 14.

14. *Automobiles*—181(1)

Automobile guest statute may logically be a legislative endeavor to promote financial responsibility for damage caused by the negligent operation of motor vehicles by protecting liability insurance companies from the human propensities of jurors to weigh their "benevolent thumb" along with the evidence of the defendant's negligence. IC 1971, 9-3-3-1; Const. art. 1, § 23; U.S.C.A. Const. Amend. 14.

15. *Automobiles*—181(1)

Constitutional Law—243(2)

Classification created by the automobile guest statute has a rational relationship to purposes of fostering hospitality, eliminating possibility of collusive lawsuits, and protecting against the "benevolent thumb" syndrome of jurors who may assume that the real defendant when a guest sues his host is an insurance company, and statute does not deny equal protection. IC 1971, 9-3-3-1; Const. art. 1, § 23; U.S.C.A.Const. Amend. 14.

16. *Automobiles*—181(1)

Constitutional Law—321

Automobile guest statute does not offend against provision in Indiana Constitution that every man, for injury

(Exhibit A)

done to him, shall have remedy by due course of law. IC 1971, 9-3-3-1; Const. art. 1, § 12.

17. *Automobiles*—181(1)

A guest invited by the host, as well as a self-invited guest, is within the scope of the automobile guest statute. IC 1971, 9-3-3-1.

18. *Automobiles*—181(1)

Automobile guest statute is not unconstitutional on theory that it promotes negligent and careless driving. IC 1971, 9-3-3-1; Const. art. 1, § 1.

19. *Automobiles*—181(1)

The crux of the automobile guest statute is that to afford a recovery, the course of conduct which was the proximate cause of the injury complained of must have been pursued with knowledge and indifference that an injury to the guest is probable. IC 1971, 9-3-3-1.

20. *Automobile*—181(1)

Under the guest statute, negligence alone is not enough to afford a recovery by a guest, but depending upon the circumstances surrounding the acts or omissions causing the injury, it may evidence the willfulness or wantonness required by the statute. IC 1971, 9-3-3-1.

21. *Automobiles*—181(1)

It is the conscious indifference to the consequences that renders conduct wilful or wanton within the guest statute. IC 1971, 9-3-3-1.

22. *Automobiles*—181(1)

Fact that host might have been negligent did not preclude possibility that he might also have been wilful and wanton, as those terms are defined in context of the automobile guest statute. IC 1971, 9-3-3-1.

(Exhibit A)

Ronald K. Gehring, Tourkow, Danehy, Crell, Hood & Gehring, Fort Wayne, Theodore Lockyear and Steven T. Barber, Evansville, Samuel J. Bernardi, Jr., John P. McQuillan, Valparaiso (Spangler, Jennings, Spangler & Dougherty, Valparaiso, of counsel), for appellants.

Robert H. Hahn and George A. Porch, Rodney H. Grove, Evansville (Bamberger, Foreman, Oswald & Hahn, Evansville, of counsel), Stephen H. Meyer, Byron M. Chudom, Schererville (Chudom & Pressler, Schererville, of counsel), for appellees.

PRENTICE, Justice.

Plaintiff (Appellant) was injured while a guest passenger in an automobile operated by Defendant (Appellee). She filed a two-count complaint for damages in the United States District Court for the Southern District of Indiana, alleging "negligence" in Count I and "wanton and wilful misconduct" in Count II. The District Court sustained the defendant's motion for summary judgment on Count I, in view of the guest statute. Final judgment was entered against the plaintiff on that count.

On appeal to the United States Court of Appeals for the Seventh Circuit, Plaintiff has challenged the constitutionality of the Indiana Guest Statute, asserting that it violates Article 1, §§ 12[1] and 23[2] of the Indiana Constitution and

[1] All courts shall be open; and every man, for injury done to him in his person, property, or reputation, shall have remedy by due course of law. Justice shall be administered freely, and without purchase; completely, and without denial; speedily, and without delay.

[2] The General Assembly shall not grant to any citizen, or class of citizens, privileges or immunities which, upon the same terms, shall not equally belong to all citizens.

(Exhibit A)

the equal protection clause of the Fourteenth Amendment to the Constitution of the United States.[3]

There being no precedents in the decisions of this Court upon such questions, the United States Court of Appeals has, pursuant to our Appellate Rule 15(N), certified the following questions to us and has requested our instructions thereon.

"1. Does the Indiana Guest Statute contravene Article 1, Section 12, of the Indiana Constitution?

"2. Does said Act contravene Article 1, Section 23 of the Indiana Constitution?"

• • •

Plaintiff (Appellee) was a guest passenger in the automobile operated by the defendant (appellant) as a consequence of having accepted his social invitation. While so engaged, the parties were involved in a one-automobile accident, alleged by Plaintiff to have been proximately caused by the defendant's negligent and wilful and wanton operation of the vehicle. Prior to commencement of the trial, the trial court entered a ruling declaring the Indiana Guest Statute[4] unconstitutional as violative of the equal protec-

[3] § 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

[4] Ind.Code § 9-3-3-1 (Burns 1973) provides: The owner, operator, or person responsible for the operation of a motor vehicle shall not be liable for loss or damage arising from injuries to or death of a guest, while being transported without payment therefor, in or upon such motor vehicle, resulting from the operation thereof, unless such injuries or death are caused by the wanton or wilful misconduct of such operator, owner, or person responsible for the operation of such motor vehicle.

tion clauses of the United States and Indiana Constitutions. The plaintiff, however, attacks it upon other constitutional grounds as well, including the "due course of law" provision of Article 1 § 12 of our state constitution.

STANDARD OF REVIEW AND BURDEN

[1-3] In approaching a consideration of the constitutionality of a statute, we must at all times exercise self restraint. Otherwise, under the guise of limiting the Legislature to its constitutional bounds, we are likely to exceed our own. That we have the last word only renders such restraint the more compelling. We, therefore, remind ourselves that in our role as guardian of the constitution, we are nevertheless a court and not a "supreme legislature." We have no right to substitute our convictions as to the desirability or wisdom of legislation for those of our elected representatives. We are under a constitutional mandate to limit the General Assembly to its lawful territory of prohibiting legislation which, although enacted under the claim of a valid exercise of the police power, is unreasonable and oppressive. Nevertheless, we recognize that the Legislature is vested with a wide latitude of discretion in determining public policy. Therefore, every statute stands before us clothed with the presumption of constitutionality, and such presumption continues until clearly overcome by a showing to the contrary.

[4] In the deliberative process, the burden is upon the challenger to overcome such presumption, and all doubts are resolved against his charge. The plaintiff, Leonherdt (Green), would avoid the application of the aforementioned standards and shift the burden that we believe is hers by charging that the right to bring an action for common law negligence is "fundamental" and that the burden is therefore upon the proponent of constitutionality to show a compelling state interest justifying the legislative classification. We reject this proposition.

[5-7] Both this Court and the United States Supreme Court have upheld the right of states to abolish or modify the common law. *Liberty Warehouse Co.* v. *Burley Tobacco Growers' Co-Op. Marketing Association,* (1928) 276 U.S. 71, 48 S.Ct. 291, 72 L.Ed. 473; *Brooks* v. *Robinson,* (1972) 259 Ind. 16, 284 N.E.2d 794; *Bissell Carpet Sweeper Co.* v. *Shane Co.,* (1957) 237 Ind. 188, 143 N.E.2d 415. It is only required that the manner and effect of abolition not violate any relevant constitutional constraints. *Chaffin* v. *Nicosia,* (1974) 261 Ind. 698, 701, 310 N.E.2d 867, 869. Fundamental rights are those which have their origin in the express terms of the constitution or which are necessarily to be implied from those terms. *San Antonio Indep. School Dist.* v. *Rodriquez,* (1973) 411 U.S. 1, 93 S.Ct. 1278, 36 L.Ed.2d 16. The right asserted by the plaintiff is not such a right.

[8, 9] Within the context of these cases, at least, we see no differences in the equal protection provisions of the state and federal constitutions. Both are designed to prevent the distribution of extraordinary benefits or burdens to any group. However, the power to establish legislative classifications of persons has not been categorically denied but only severely limited. Rather, our courts have required only that such classifications meet certain tests. If neither a fundamental right nor a suspect classification is involved, the standard of review is that the classification not be arbitrary or unreasonable. *Dandridge* v. *Williams,* (1970) 397 U.S. 471, 90 S.Ct. 1153, 25 L.Ed.2d 491, and that a "fair and substantial" relationship exist between the classification and the purpose of the legislation creating it. *Johnson* v. *Robinson,* (1974) 415 U.S. 361, 94 S.Ct. 1160, 39 L.Ed.2d 389; *Reed* v. *Reed,* (1971) 404 U.S. 71, 92 S.Ct. 251, 30 L.Ed.2d 225; *Royster Guano Co.* v. *Virginia,* (1920) 253 U.S. 412, 40 S.Ct. 560, 64 L.Ed. 989. See also *Gunther, The Supreme Court,* 1971 Term, Forward: In Search of Evolving Doctrines of a Changing Court: A Model For a Newer Equal Protection, 86 Harv.L.Rev. 1 (1972).

Our guest statute precludes a guest passenger from recovering damages for personal injuries sustained merely by the negligence of the owner or operator. Being inoperative as to passengers who were not guests, the statute creates two classifications of passengers—guests and non-guests, who are treated vastly differently under circumstances that are otherwise identical. The inequity is patent. The issues are whether or not the classification is reasonable and bears a fair and substantial relation to the legitimate purpose of the statute. The presumptions are that it is and does, and the burden is upon the plaintiff to show the contrary.

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DEMPSEY v. LEONHERDT (GREEN)

We shall proceed to a consideration of *Dempsey* v. *Green*, and our determination thereof will control our response to the questions certified to us in *Sidle* v. *Majors*.

Approximately one-half of the United States enacted guest statutes similar to our own between the years 1927 and 1939. A number of such statutes have since been repealed, but it appears that at least 20 have not. At least 12[5] of such statutes had their constitutionality promptly tested —predominately by a claim of equal protection denial. Except for *Silver* v. *Silver*, (1929) 280 U.S. 117, 50 S.Ct. 57,

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[5] *Pickett* v. *Mathews*, (1939) 238 Ala. 542, 192 So. 261; *Roberson* v. *Roberson*, (1937) 193 Ark. 669, 101 S.W.2d 961; *Forsman* v. *Colton*, (1933) 136 Cal.App. 97, 28 P.2d 429; *Silver* v. *Silver*, (1928) 108 Conn. 371, 143 A. 240; *Coleman* v. *Rhodes*, (1932), Del. Super., 5 W.W.Harr. 120, 159 A. 649; *Ludwig* v. *Johnson*, (1932) 243 Ky. 533, 49 S.W.2d 347; *Naudzius* v. *Lahr*, (1931) 253 Mich. 216, 234 N.W. 581, 74 A.L.R. 1189; *Rogers* v. *Brown*, (1935) 129 Neb. 9, 260 N.W. 794; *Smith* v. *Williams*, (1935) 51 Ohio App. 464, 1 N.E.2d 643; *Perozzi* v. *Ganiere*, (1935) 149 Or. 330, 40 P.2d 1009; *Campbell* v. *Paschall*, (1938) 132 Tex. 226, 121 S.W. 2d 593; *Shea* v. *Olson*, (1936) 185 Wash. 143, 53 P.2d 615.

74 L.Ed. 221, the only one of such cases to have been determined by the Supreme Court of the United States, those decisions are not binding upon this Court. They are, nevertheless, worthy of our careful analysis and consideration; and we are the incidental beneficiaries of the labors of highly qualified lawyers and judges who have extensively litigated questions which, although at a variance in some particulars, are essentially identical to the ones confronting us.

Silver v. *Silver, supra*, was limited to a single question of equal protection under the United States Constitution. The statute was upheld, with but little elaboration, as a permissible legislative strike at what the Legislature regarded as the evils of vexatious litigation arising out of the gratuitous carriage of passengers in automobiles. It was further said that the distinction drawn between passengers in automobiles and in other vehicles was not disabling, inasmuch as the Legislature could not be held rigidly to the choices of regulating all or none and that even though some abuses may not be hit, it was enough that the statute struck at the evil where it was felt and reached the class of cases where it most frequently occurred.

In determining if our statute bears a fair and substantial relationship to the purpose for which it was enacted, its purpose must first be ascertained. No purpose being expressed in the text of our statute and there being no legislative records from which it may be gleaned, we are required to make this determination from a consideration of what its effects are likely to be. If any logical purpose can be perceived, we are bound to test it, although this may require considerable speculation.

[10] Purposes traditionally attributed to such statutes have been the fostering of hospitality by insulating generous drivers from lawsuits instituted by ungrateful guests and the elimination of possibility of collusive lawsuits.

A number of other purposes have also been proffered by both proponents and opponents to the statutes, but we believe their existence to be unsupportable. We shall, therefore, proceed to a consideration of whether or not the classification of guests and non-guests are reasonable and are fairly and substantially related to either or both of such purposes.

During the forty-three years following the *Silver* decision, there were at least fourteen guest statutes challenged,[6] and although there were exceptions, notably the Court of Appeals of Kentucky, state courts generally upheld such statutes upon the authority of the *Silver* case. 8 Am.Jur.2d *Automobiles and Highway Traffic* § 472, pp. 36, 37. Since 1973, however, not fewer than seventeen such cases have been litigated in the state courts of last resort.[7] As might be expected, the deluge followed a holding that if there had

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6 *See* note 5, *supra*. See also *Vogts* v. *Guerette*, (1960) 142 Colo. 527, 351 P.2d 851; *Hillock* v. *Heilman*, (Fla.1967) 201 So. 2d 544; *Delany* v. *Badame*, (1971) 49 Ill.2d 168, 274 N.E.2d 353; *Romero* v. *Tilton*, (1967) 78 N.M. 696, 437 P.2d 157.

7 *Beasley* v. *Bozeman*, (1975) 294 Ala. 288, 315 So.2d 570; *White* v. *Hughes*, (1975) Ark., 519 S.W.2d 70; *Brown* v. *Merlo*, (1973) 8 Cal.3d 855, 106 Cal.Rptr. 388, 506 P.2d 212; *Richardson* v. *Hansen*, (1974) Colo., 527 P.2d 536; *Justice* v. *Gatchell*, (1974) Del., 325 A.2d 97; *Thompson* v. *Hagan*, (1974) 96 Idaho 19, 523 P.2d 1365; *Keasling* v. *Thompson*, (Iowa 1974) 217 N.W.2d 687; *Henry* v. *Bauder*, (1974) 213 Kan. 751, 518 P.2d 362; *Manistee Bank & Trust Co.* v. *McGowan*, (1975) 394 Mich. 655, 232 N.W.2d 636; *Botsch* v. *Reisdorff*, (1975) 193 Neb. 165, 226 N.W.2d 121; *Laakonen* v. *Eighth Judicial District Court*, (1975) Nev., 538 P.2d 574; *McGeehan* v. *Bunch*, (1975) 88 N.M. 308, 540 P.2d 238; *Johnson* v. *Hassett*, (N.D.1974) 217 N.W.2d 771; *Primes* v. *Tyler*, (1975) 43 Ohio St.2d 195, 331 N.E.2d 723; *Duerst* v. *Limbocker*, (1974) Or., 525 P.2d 99; *Behrns* v. *Burke*, (1975) S.D., 229 N.W.2d 86; *Cannon* v. *Oviatt*, (Utah 1974), 520 P.2d 883. *See Also Tisko* v. *Harrison*, (Tex.Civ.App.1973) 500 S.W.2d 565.

ever been substantial and rational relations between classifications created in the aforementioned legislative purposes, a fact not admitted, they had nevertheless been eroded by total alteration of the relevant factual premises. *Brown* v. *Merlo*, (1973) 8 Cal.3d 855, 106 Cal.Rptr. 388, 506 P.2d 212. With the exception of *Primes* v. *Tyler*, (1975) 43 Ohio St.2d 195, 331 N.E.2d 723, these cases have been determined in the light of the *Brown* case, the courts either adopting one or more of its rationales or rejecting them all. A review of *Brown*, therefore, eliminates the need for a detailed review of each such case.

The *Brown* opinion accepted the traditional concept that the legislative purposes were the protection of hospitality and elimination of collusive lawsuits and proceeded to demonstrate, to the satisfaction of that court, that neither constituted a rational basis for the different treatment actually accorded by the classification scheme.

The *Brown* opinion has been skillfully drawn, and counsel advocating the repeal of the statute probably could do no better than to parrot the numerous declarations embodied therein decrying its rationality. After having carefully considered that case and the arguments of counsel for the plaintiff herein, however, we have not been persuaded, and the presumption of constitutionality remains. We shall cite and comment upon some of the more notable points of *Brown*, but we are not required to meet and vacate each proposition and supportive conclusion thereof, and we will make no attempt to do so although doubtlessly some do have merit.

The California statute distinguishes between automobile guests and all other guests.

We grant that the host in another conveyance or in his home or at any other place is also logically entitled to protection against the ingrate who would take an unconscionable advantage of his generosity. This argument was taken

into account in *Silver* v. *Silver, supra,* and it was held that the Legislature is not held rigidly to a choice of regulating all or none, but that it is sufficient if it strikes at an evil where it most frequently occurs. Additionally, the Indiana statute, although restricted in its application to motor vehicle guest passengers, is considerably broader than is the California act, which was applicable only to automobile passengers.

It was said in *Brown* that the fact that a guest had not paid for the ride could not serve as a rational basis to single him out for discriminatory treatment, and asserted that it was invidious wholly to deprive a non-paying passenger protection against a negligent injury.

The California court acknowledged the reasonableness of requiring a higher standard of care for paying passengers than for non-paying ones. Is there really a basic distinction between raising a standard for persons within a given class and in lowering the standard for persons not within that class? In either event, there is a recognized disparity. And, if a disparity of one degree is accepted, can we say, without other factors being present, that a disparity of two degrees is invidious?

Quoting from another case, the California court said, "We see no reason why the host should be less vigilant for his own guest than he must be for a guest in another car."

We recognize that the guest in the other car was given no option. Granting that in a utopian society, a host would exercise greater care for the safety of his guests than he would for his own, is it reasonable that the guest should have a right to demand it? Is it unreasonable to expect him either to cast his lot with his host or to decline to accept the hospitality?"

"• • • Widespread liability insurance has largely eliminated any notion of 'ingratitude' that may have once adhered to a guest suit against his host."

Liability insurance is not a general condition precedent to ownership or operation of a motor vehicle in this state. Neither does this argument take into account that the guest's claim need not be limited to the host's liability insurance limits or that such insurance is provided for the protection of a host—not for the benefit of a guest. It also occurs to us that substantial detriments accrue to one who finds himself the defendant in a tort action, not the least of which is the possibility of a cancellation of his insurance or a substantial increase in his premiums. Notwithstanding that there may be no direct financial loss arising from it, a lawsuit is not an experience which endears the plaintiff to the defendant.

"• • • If the guest statute's operation could originally be justified as rationally related to an interest in protecting hosts from ingratitude, this purpose can no longer support a provision's constitutionality in light of present liability insurance coverage."

For the reason stated above, we do not accept this proposition. If we did, however, it can not be denied that the same circumstances, i. e. that the increased use of liability insurance, renders the policy of protecting against insurance frauds all the more reasonable.

"• • • It is unreasonable to eliminate causes of action of an entire class of persons simply because some undefinite portion of a designated class may file fraudulent lawsuits."

[11] This statement is drawn from cases wherein various tort immunity doctrines have been overturned. The premise has considerable validity, and the leaning of this Court is discernible from our holdings in recent cases abolishing the doctrines of interspousal immunity,[8] charitable

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[8] *Brooks* v. *Robinson,* (1972) 259 Ind. 16, 284 N.E.2d 794.

immunity,[9] and governmental immunity.[10] The value of such doctrines is relative, and the judgment of reasonableness, therefore must be made in view of that relativity. But who is to make the judgment? These doctrines of immunity were judicially created and therefore were subject to judicial repeal when, in our opinion, they were determined to be no longer compatible in our society. The decision to grant immunity to host drivers against negligence claims of guest passengers, on the other hand, was made by the Legislature, and we, therefore, are not at liberty to abolish it upon the same considerations.

"* * * The 'collusion' rationale assumes that the parties —driver and guest—are willing to perjure themselves on the negligence issue, and thus that the guest must be entirely precluded from prosecuting any lawsuit. Under the terms of the guest statute, however, the rider and driver can escape the State's bar, and thwart the 'anti-collusion' purpose, simply by colluding on the issue of whether the rider provided any 'compensation' for the ride."

[12] The line between due care and negligence is a fine one and not susceptible to precise formulation. A determination of whether or not due care was exercised may be greatly influenced by such testimonial factors as a half truth, a slight exaggeration, a careless omission, a voice inflection or a glance. There can be no effective statutory protection against perjury. We think it no constitutional infirmity that a statute may not operate to perfection, if it may reasonably be expected to operate effectively. We do not agree with the California Court that the classifications are so over-inclusive as to defy notions of fairness or reasonableness.

The Supreme Court of Ohio in *Primes* v. *Tyler*, (1975) 43 Ohio St.2d 195, 331 N.E.2d 723, in overturning its guest

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9 *Harris* v. *Young Women's Christian Association*, (1968) 250 Ind. 491, 237 N.E.2d 242.

10 *Campbell* v. *State*, (1972) 259 Ind. 55, 284 N.E.2d 733.

statute, proceeded upon the traditional premise as to its purposes. Although recognizing the validity of the State's interests, it held that the objective of preventing ingratitude, to which we have referring as "fostering hospitality," was no longer viable in view of the availability of liability insurance which factor, it acknowledged, had previously led it to abrogate the doctrine of charitable immunity—a judge created doctrine. With respect to the "anti-collusion" purpose, the Ohio Court invoked a combination equal protection and due process argument used successfully in *Vlandis* v. *Kline*, (1973) 412 U.S. 441, 93 S.Ct. 2230, 37 L.Ed.2d 63.

In *Vlandis* v. *Kline, supra,* the State of Connecticut had enacted a statute designed to deny the lower tuition rates of the state universities to students who were not bona fide Connecticut residents and to those who took up such residency for the purpose of obtaining the favored rates. The statute drew strict classifications and proceeded to make them "permanent and irrebuttable." It was obvious that the statute would operate against some bona fide residents who were not within the scope of the statutory purpose and the Court held that the denial of the opportunity to controvert the presumption and to prove the bona fides of residency by presenting evidence infringed upon the right to due process and equal protection. The Ohio Court reasoned that the guest act imposed, in effect, an "irrebuttable presumption" that a lawsuit filed by a nonpaying guest was fraudulent or collusive, when such presumption was not necessarily true in fact, and that it, therefore, denied a "remedy by due course of law."

[13] *Vlandis* v. *Kline, supra,* is, for us, difficult to interpret, but we would not apply it as did the Ohio Court. Three Justices joined in the majority opinion, and three in the result. The Justices concurring in the result wrote two separate opinions, and the three dissenting Justices wrote two dissenting opinions. A factor that stands out in

that case but which is absent in the Ohio case and in the one before us, is a finding that reasonable alternative means for determining bona fide residence were available. We acknowledge an "overbreadth" in our guest statute, in that those with bona fide damage claims are caught in the same net with the would-be collusive and fraududent. However, we perceive no reasonable alternative. There is no way, short of full-blown litigation—the very evil the act is designed to avert—that the bona fides of the plaintiff's claim could be determined.

We perceive a third and to us a very likely legislative policy behind our guest statute, one which has not, to our knowledge, been previously suggested in any of the litigated cases and which, for want of a better designation, could be called protection against the "benevolent thumb syndrome." This policy recognizes the value to our society of liability insurance to protect against the inequity of damages inflicted by otherwise financially irresponsible motor vehicle owners and operators. This policy also recognizes that the cost of such insurance is unalterably determined by the loss experiences of the companies providing such insurance, that such insurance is optional with the owners and operators and is purchased by them, not for the benefit of the victims of the negligence but rather for their own personal benefit and at their expense. The policy also recognizes the "Robin Hood" proclivity of juries. The tendency to take from the rich and give to the needy is as American as apple pie; but unfettered, it may logically be expected to lead to the escalation of liability insurance premiums to the level where the majority of users would be either unable or unwilling to pay them. We have witnessed the development of just such conflicts in recent years, particularly with respect to both motor vehicle and professional liability insurance.

We uniformly recognize that the presence or absence of liability insurance is a factor that weighs improperly, but

heavily, in jury determinations. It is for this reason that we endeavor—although frequently without success—to keep such information from juries.

[14] The cases that recognized the "fostering of hospitality" as a legislative purpose of guest statutes, also appear to have recognized that hospitality is deserving of gratitude and generally generates it. Great tolerance for the errors and human frailties of one's family members, neighbors and friends is also the norm and motivates the vast majority of us to accept the burdens that they may occasionally inflict upon us, rather than to seek legal redress. Therefore, when a damage suit has been filed against a plaintiff's host for injuries sustained in an automobile accident, it is highly probable that the host's loss, if any, is compensable from liabilty insurance. Otherwise, the suit would not likely have been filed. In fact, in the recent cases hereinbefore cited, one of the reasons most frequently urged and accepted for holding the fostering of hospitality to be no longer, if ever, a valid legislative purpose, has been that wide spread liability insurance has largely eliminated any notion of ingratitude that may at one time have adhered to a guest suit against his host—that there simply is no notion of ingratitude in suing your host's insurer. It is, therefore, not unreasonable to credit the Legislature with recognizing that when a guest sues his host, the jury can and will most likely assume that the real defendant is an insurance company and will relax the standard of proof traditional in negligence actions and renders biased judgments in favor of plaintiffs. The guest statute may, therefore, logically be a legislative endeavor to promote financial responsibility for damages caused by the negligent operation of motor vehicles by protecting liability insurance companies from the human propensities of juries to weigh their "benevolent thumb" along with the evidence of the defendant's negligence.

(Exhibit A)

[15] It is at once obvious that the concept of protecting against the "benevolent thumb syndrome" is subject to attack as a denial of equal protection upon many of the same basis advanced against the "hospitality" and "anti-collusion" arguments. We believe, however, that such attacks are less piercing because the policy carries the armor of a more logical and therefore more probable legislative purpose.

[16] In support of the contention that our guest statute offends against Indiana Constitution Article 1, § 12, it is urged that the statute purports to eliminate a remedy guaranteed to remain inviolate, and we are cited to *Ludwig* v. *Johnson et al.*, (1932) 243 Ky. 533, 49 S.W.2d 347. The Kentucky constitutional provision is almost identical to our own, providing, "All courts shall be open, and every person for an injury done him in his lands, goods, person or reputation, shall have remedy by due course of law, * * *." (Kentucky Constitution Article 14). The Kentucky opinion is difficult to interpret, because it appears to base the decision upon three distinct constitutional provisions, leaving vagueness as to whether the decision could stand upon the "due course of law" provision alone.

Another section of the Kentucky Constitution unmistakably provides for the recovery of damages for death caused by negligence. (Kentucky Constitution § 241), a provision in no manner contained in our own Constitution. The Kentucky guest statute, like our own, eliminated most actions for death, as well as most actions for injuries, occurring to motor vehicle guest passengers. The Kentucky Court stated that the guest act clearly contravened the aforementioned constitutional provision allowing damages for deaths caused by negligence. Responding to an argument that the invalid provision could be eliminated by eliminating the word "death" and that the valid portion of the statute was severable from the invalid, the court said that

(Exhibit A)

it was "unnecessary to pursue that avenue of inquiry, * * *" and proceeded to additional considerations.

The Kentucky Constitution also has another proposition not found in our own. "The General Assembly shall have no power to limit the amount to be recovered for injuries resulting in death, or for injuries to person or property." (Kentucky Constitution § 54.) The court viewed this provision in conjunction with §§ 14 and 241 noted above and said, "* * * The conclusion is inescapable that the intention of the framers of the Constitution was to inhibit the Legislature from abolishing rights of action for damages for death or injuries caused by negligence."

The Kentucky Court then proceeded to a consideration of Section 14 of its Constitution and a review of *Stewart* v. *Houk*, (1928) 127 Or. 589, 271 P. 998, where a similar guest statute had been declared to be in conflict with a constitutional provision almost identical to Kentucky Constitution Section 14, the Oregon Court saying that the purpose of the constitutional provision was "to save from legislative abolishment those jural rights which had become well established prior to the enactment of our Constitution." Thus, it could be argued persuasively that the Kentucky Court was saying that Section 14 of its Constitution standing alone was a bar to the guest statute. If so, however, we are perplexed by the Court's lengthy dissertations upon the other constitutional sections mentioned and the reference to their inter-play.

We also note that both the Oregon and Kentucky acts went further than our own. The Oregon act precluded all actions for death and injuries sustained by guest passengers, and the Kentucky act precluded all actions for such deaths and injuries, except those resulting from intentional acts. Our own statute preserves the right of recovery for injuries and deaths caused by "wanton or wilful misconduct."

We also note, that the Oregon Court, subsequent to its decision in *Stewart* v. *Houk, supra,* upheld a revised guest statute which preserved causes for deaths and injuries if "such accident shall have been intentional on the part of said owner or operator or caused by his heedlessness or his reckless disregard of the rights of others." The Oregon Court, commenting upon the Kentucky decision, observed that the Kentucky act limited recovery to instances in which the accident "resulted from an intentional act" and elected to follow cases holding that a right of action for a tort to happen in the future was not property and that through Legislatures could not extinguish a right entirely, they could restrict or modify liability.

We decline to comment upon the Oregon statutory reference to intentional accidents except to acknowledge our curiosity concerning such an apparent incongruity.

We are drawn to *Gallegher* v. *Davis et al.*, (1936), Del. Super., 7 W.W.Harr. 380, 183 A. 620, as a logical disposition of the "due course of law" arguments. In that case, the court was concerned with a constitutional provision almost identical to our own.[11] And a guest statute containing the saving provision, "unless such accidents shall have been intentional on the part of such owner or operator or caused by his wilful or wanton disregard of the rights of others." The Delaware Court, like Oregon's, had previously

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[11] Delaware Constitution, Art. 1 § 9 provides: All courts shall be open; and every man for an injury done him in his reputation, person, movable or immovable possessions, shall have remedy by the due course of law, and justice administered according to the very right of the cause and the law of the land, without sale, denial, or unreasonable delay or expense; and every action shall be tried in the county in which it shall be commenced, unless when the judges of the court in which the cause is to be tried shall determine that an impartial trial thereof cannot be had in that county. Suits may be brought against the State, according to such regulations as shall be made by law.

invalidated a guest statute containing no such savings provision because it denied a right of action to a guest in an automobile under all circumstances. *Coleman* v. *Rhodes,* (1932), Del.Super., 5 W.W.Harr. 120, 159 A. 649. The following quotations from the *Gallegher* case are expressive of our viewpoint of the restraints imposed by our constitutional Article 1, § 12.

> "Generally, we think, the provision is inserted in Constitutions to secure the citizen against unreasonable and arbitrary deprivation of rights whether relating to life, liberty, property, or fundamental rights of action relating to person or property; and that it applies as well to the judicial branch of government, as to the legislative and executive branches. It embraces the principle of natural justice that in a free government every man should have an adequate legal remedy for injury done him by another.
>
> "The inquiry, in every case, must be directed to the nature of the right alleged to have been infringed upon. Undoubtedly, arbitrary and unreasonable abolishment of a right of action to redress injury to the essential rights of person or property is prohibited. Certainly, the legislature may not declare to be right that which is essentially wrong, nor say that which is a definite, substantial injury to fundamental rights to be no injury, nor abolish a remedy given by the common law to essential rights without affording another remedy substantially adequate. But no one has a vested interest in any rule of the common law. Rights of property which have been created by the common law cannot be taken away without due process; but the law itself, as a rule of conduct, within constitutional limits, may be changed at the will of the legislature. The great office of statutes is to remedy defects in the common law as they develop, and to adopt it to the change of time and circumstance. *Munn* v. *Illinois,*

(Exhibit A)

94 U.S. 113, 24 L.Ed. 77; *Mackin* v. *Detroit-Timkin Axle Co.*, 187 Mich. 8, 153 N.W. 49. Negligence is merely the disregard of some duty imposed by law; and the nature and extent of the duty may be modified by legislation, with a corresponding change in the test of negligence, *New York Cent. R. Co.* v. *White*, 243 U.S. 188, 37 S.Ct. 247, 61 L.Ed. 667, L.R.A.1917D, 1, Ann.Cas.1917D, 629, and, as said by the same court with respect to the Fourteenth Amendment, in *Silver* v. *Silver, supra,* when that case was before it (280 U.S. 117, 50 S. Ct. 57, 58, 74 L.Ed. 221, 65 R.L.R. 939), 'We need not • • • elaborate the rule that the Constitution does not forbid the creation of new rights, or the abolition of old ones recognized by the common law to attain a permissible legislative object.'

"• • •

"We cannot say that the existing conditions did not present a manifest evil affecting the general welfare and public morals necessitating the imposition of a degree of restraint upon a certain class of suitors, nor can we say that the means adopted by the legislature do not bear a reasonable relation to the end sought to be accomplished.

"The provision of the Constitution does not, either expressly or by necessary implication, forbid the legisnature to measure the degree of care to be accorded by an owner or operator of an automobile to a gratuitous passenger; for it does not constitute the common law a straight jacket about the legislative body rendering it powerless reasonably to regulate social relations in accordance with changing conditions." 183 A. 624-26.

That our Constitution was not intended to render the common law static is made clear to us by its schedule which expressly provides for changes in the following language: "Laws continued—First. All laws now in force, and not

(Exhibit A)

inconsistent with this Constitution, shall remain in force, *until they shall expire or be repealed.*" (Emphasis ours). Essentially, the same provision was also embodied in our first constitution (1816) under Article XII, Section 4.

[17] Plaintiff (Appellee) Green argues alternatively that if the guest statute be held constitutional, it, nevertheless, does not bar her action because as a guest invited by the host, as opposed to a self-invited guest, she was not within the scope of the guest statute. She has cited no authority in support of this proposition, and we reject it as being without merit. The considerations determining whether or not one is a guest being transported without payment therefor and thus within the scope of the statute, were set forth in *Allison* v. *Ely et al.*, (1960) 241 Ind. 248, 170 N.E.2d 371, Reh. Den.

We there said that if the trip is primarily social or for pleasure as distinguished from business, incidental benefits, even payment, do not preclude the guest relationship.

[18] We also reject, as frivolous, Plaintiff's unsupported argument that the guest statute promotes negligent and careless driving and consequently violates Article 1, Section 1 of our state Constitution.

• • •

HOLDINGS

• • •

DEMPSEY v. LEONHERDT (GREEN)

In *Dempsey* v. *Green,* we hold that the trial court erred in its determination that the Indiana guest statute is unconstitutional and in its overruling of the defendant's (appellant's) motion to correct errors. The court's rulings granting the plaintiff (appellee) a new trial upon the issue of damages and upon the motion to correct errors addressed thereto are rendered moot.

(Exhibit A)

The parties, by their briefs, agree that the case was submitted to the jury solely upon the theory of negligence, in view of the trial court's pretrial ruling upon the constitutional issue. They are not in agreement, however, concerning the appropriate order to be issued by this Court in the event we reverse the trial court. The defendant (appellant) contends that the finding of negligence by the jury precludes the existence of wanton and wilful misconduct prerequisite to a recovery under the guest statute. He cites us to *Dierickx* v. *Davis, Agent*, (1922) 80 Ind.App. 71, 137 N.E. 685, wherein it was said that negligence could not merge into wilfulness. That was not a guest statute case, however, and we think the statements from it are not applicable in such context.

[19-22] The crux of our guest statute is that to afford a recovery, the course of conduct which was the proximate cause of the injury complained of must have been pursued with knowledge and indifference that an injury to the guest is probable. *Bedwell* v. *DeBolt*, (1943) 221 Ind. 600, 50 N.E. 2d 875. Negligence alone is not enough, but depending upon the circumstances surrounding the acts or omissions causing the injury, it may evidence the wilfulness or wantonness required by the statute. It is the conscious indifference to the consequences that renders conduct wilful or wanton. That the defendant might have been negligent, therefore, does not preclude the possibility that he might also have been wilful and wanton, as those terms have been defined in context with our guest statute. That is a question for the jury to determine under proper instructions from the court.

The judgment of the trial court is reversed and the cause is remanded for further proceedings consistent with this opinion.

• • •

(Exhibit A)

SIDLE v. MAJORS

The foregoing opinion in *Dempsey* v. *Leonherdt (Green)* is determinative of the questions certified to us by the United States Court of Appeals for the Seventh Circuit.

The Indiana guest statute, being Acts of 1929, ch. 201, § 1, as amended by Acts of 1937, ch. 259, § 1; Ind.Code § 9-3-3-1 (Burns 1973), does not contravene either § 12 or § 23 of Article 1 of the Constitution of Indiana.

The Clerk of this Court is directed to certify copies of this opinion to The Honorable Robert A. Sprecher, Judge, The Honorable Walter J. Cummings, Judge, and The Honorable Thomas E. Fairchild, Chief Judge, all of the United States Court of Appeals for the Seventh Circuit, Chicago, Illinois.

GIVEN, C. J., and DeBRULER and HUNTER, JJ., concur.

ARTERBURN, J., concurs with opinion.

ARTERBURN, Justice (concurring).

I concur in what is said by the majority in this case about the constitutionality of the guest passenger statute. It occurs to me, however, that this whole question is easily resolved by analogy to the law of bailments.

Under the common law (not by statute) a paid bailee or one for hire was required to exercise a higher degree of care than a gratuitous bailee who assumed possession of property out of generosity or kindness. "It is ordinarily stated that where a bailment is for the sole benefit of the bailor, the bailee is liable only for gross negligence or bad faith, willful act, or fraud." 8 C.J.S. *Bailments* § 28 at 418-419 (1962); *see also* 8 Am.Jur.2d *Bailments* § 209 (1963).

(Exhibit A)

In other words, the common law imposed upon a warehouseman or carrier of freight for pay a higher standard of care than that imposed upon one storing property for no payment for a friend or neighbor. The legislature has the right to enact the same principle with reference to gratuitous operators of automobiles with guests and those who are paid for the transportation of passengers. If at common law the courts saw fit to impose different degrees of negligence and care with reference to gratuitous acts as compared with those for pay, then certainly the legislature constitutionally may do so.

EXHIBIT B

BRADY v. *ACS*
Cite as 342 N.E.2d 837

Richard BRADY, Appellant
(Defendant below),

v.

Carmen ACS, Administratrix of the Estate of Santiago Lazaro, Deceased, Appellee
(Plaintiff below).

No. 775S165.

Supreme Court of Indiana.

March 4, 1976.

Wrongful death action was brought against the operator of an automobile in which decedent had been a guest passenger at the time of the fatal accident. Plaintiff moved for pretrial determination whether the state statute which precludes liability of a host for the death of nonpaying guest passengers, unless caused by willful or wanton misconduct, was constitutional. The trial court ruled that the guest statute was unconstitutional as a denial of equal protection of law. After a jury trial in the Porter Superior Court, Porter County, Bruce W. Douglas, J., judgment was entered on a directed verdict for plaintiff on the issue of liability, and defendant appealed. The Supreme Court, Prentice, J., held that the guest statute was not unconstitutional, and that because the theory of one of the defenses had been excluded from the issues by the trial court's pretrial ruling, the judgment could not be affirmed.

Judgment reversed and cause remanded.

(Exhibit B)

1. *Automobiles*—181(1)

Constitutional Law—245(2), 301

Statute which precludes liability of hosts for injuries or death of nonpaying guest passengers, unless caused by willful or wanton misconduct, does not deny due process and equal protection of the law as guaranteed by Federal and State Constitutions. IC 1971, 9-3-3-1.

2. *Appeal and Error*—1107

Where theory of one possible defense was expressly excluded from issues in wrongful death action by trial court's pretrial ruling that Indiana guest statute was unconstitutional, and where, subsequent to trial court's ruling, it was determined by Supreme Court that guest statute was not unconstitutional, judgment in favor of plaintiff could not be affirmed, despite plaintiff's argument that affirmance was required if judgment could be sustained on any theory presented by issues. IC 1971, 9-3-3-1.

3. *Appeal and Error*—1176(3)

Where there was no determination by either jury or trial judge, in wrongful death action, that evidence of willful or wanton misconduct on part of defendant was insufficient to support defendant's liability for the death of a guest passenger in his automobile, Supreme Court could not order directed verdict for defendant on issue of liability, even though directed verdict for plaintiff was reversed. IC 1971, 9-3-3-1.

Marshall E. Williams, Heeter, Johnson, Salb & Williams, Indianapolis, for appellant.

Stephen H. Meyer, Byron M. Chudom, (Chudom & Pressler, Schererville, of counsel), for appellee.

(Exhibit B)

PRENTICE, Justice.

Plaintiff's (Appellee's) decedent was a guest passenger in an automobile operated by Appellant (defendant) and was killed in the accident out of which this case arose. Plaintiff brought her action for wrongful death, alleging both negligence and "wilful or wanton misconduct" by the defendant. Plaintiff filed a motion for a pretrial determination of the constitutionality of Ind. Code 1971, 9-3-3-1, generally referred to as the "Indiana Guest Statute" which precludes liability of hosts for injuries or death of nonpaying guest passengers, unless caused by "wilful or wanton misconduct."

The trial court, upon the foregoing motion, ruled that the guest statute was unconstitutional as a denial of the equal protection of law, and the cause proceeded to trial upon certain stipulations of fact, certain contested issues of fact and contested issues of law.

Following the submission of the evidence, the defendant moved for a directed verdict for the reason that there was no evidence to support a finding of "wilful or wanton misconduct" as required by the guest statute. This motion was denied.

Thereupon, the plaintiff moved for a directed verdict upon the issue of liability, which motion asserted that the only inference that could be drawn from the evidence was that the defendant "negligently" operated his vehicle and thereby proximately caused the decedent's death. This motion was sustained. The jury returned a verdict for the plaintiff, and judgment was rendered thereon.

[1] The issue raised by this appeal has been resolved by our disposition of the identical issue in *Dempsey* v. *Leonherdt (Green)*, Ind., 341 N.E.2d 763, handed down February 16, 1976. In that case, we upheld the guest statute against federal and state constitutional challenges of denial of due process and equal protection of the law.

(Exhibit B)

Both the plaintiff and the defendant have, by their briefs, attempted to inject issues that are not properly before this Court and cannot be determined in this appeal. Defendant contends that if the guest statute is unconstitutional, the cause should be remanded with instructions to enter a verdict for the defendant, inasmuch as there was no evidence of "wilful or wanton misconduct;" whereas the plaintiff charges that viewing the evidence favorable to the plaintiff (appellee) and with a view towards upholding the judgment if sustainable upon any theory, we should affirm the judgment notwithstanding the constitutionality of the guest statute.

[2] The plaintiff's argument that an affirmance is required if a judgment can be sustained upon any theory presented by the issues is misplaced here, as the theory of one of the defenses was expressly excluded from the issues by the trial court's pretrial ruling. Therefore, the judgment cannot be affirmed.

[3] Neither can we order a directed verdict for the defendant, however, because there has been no determination by either the jury or the trial judge that the evidence of "wilful or wanton misconduct" was insufficient.

The judgment is reversed, and the cause is remanded to the trial court for further proceedings consistent with this opinion.

GIVAN, C. J., and ARTERBURN, DeBRULER and HUNTER, JJ., concur.

EXHIBIT C

TRACY SIDLE v. WILLIAM C. MAJORS

UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

No. 74-1746

June 1, 1976

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF INDIANA, EVANSVILLE DIVISION

HON. CALE J. HOLDER, JUDGE

SYNOPSIS: Opinion of the Supreme Court of Indiana on the certified questions under AP. 15(N) of whether the Indiana guest statute contravened Art. 1, §§12 and 23 of the Indiana Constitution at 51 Ind.Dec. 246, 341 N.E.2d 763. The contention was that the Indiana guest statute violated the equal protection clause of the fourteenth amendment.

The United States Court of Appeals for the Seventh Circuit, Cummings, Cir. J., affirmed. Fairchild, C. J., concurred with opinion. Indiana guest statute does not violate the equal protection clause of the fourteenth amendment.

Fairchild, C. J., was of the opinion that "A court is required to presume that the grounds for enacting legislation are rational, and I cannot state with the necessary certainty that in this instance the presumption has been overcome."

GUEST STATUTE—Constitutional. Does not violate the equal protection clause of the fourteenth amendment. p. 632.

BEFORE FAIRCHILD, CHIEF JUDGE, CUMMINGS AND SPRECHER, CIRCUIT JUDGES.

CUMMINGS, CIRCUIT JUDGE.

In December 1973, plaintiff, a citizen of North Carolina, filed this diversity action against defendant, an Indiana citizen. Plaintiff alleged that at 11:00 p.m. on November 18, 1972, she was an invited passenger in an Opel automobile being driven by defendant on Hart Street Road, three miles south of Vincennes, Indiana. According to Count I of the complaint, the defendant negligently failed to keep his vehicle under control and therefore was unable to negotiate a sharp left curve and drove his car into a telephone pole, causing plaintiff severe injuries; she sought $65,000 in damages. Count II of the complaint alleged that defendant's behavior constituted wanton or wilful misconduct.

In May 1974, the district court entered findings of fact and conclusions of law holding that the 1929 Indiana guest statute, as amended (Ind. Code 9-3-3-1 (Burns' 1973)),[1] required that summary judgment be entered against plaintiff on Count I.[2] Count II, based on defendant's wanton or wilful misconduct, has not yet been tried.

Both in the district court and on appeal, plaintiff challenged the constitutionality of the Indiana Guest Act under Article 1, §§12 and 23 of the Indiana Constitution[3] and the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution. Because the Indiana Supreme Court had not passed

[1]The Indiana guest statute provides:

"The owner, operator, or person responsible for the operation of a motor vehicle shall not be liable for loss or damage arising from injuries to or death of a guest, while being transported without payment therefor, in or upon such motor vehicle, resulting from the operation thereof, unless such injuries or death are caused by the wanton or wilful misconduct of such operator, owner, or person responsible for the operation of such motor vehicle."

[2]Although summary judgment was only entered for defendant on Count I, the district court certified that there was no just reason for delay and entered final judgment on that count pursuant to Rule 54(b) of the Federal Rules of Civil Procedure.

[3]Article 1, §12, of the Indiana Constitution provides:

"All courts shall be open; and every man, for injury done to him in his person, property, or reputation, shall have remedy by due course of law. Justice shall be administered freely, and without purchase; completely, and without denial; speedily, and without delay."

Article 1, §23 of the Indiana Constitution provides:

"**Privileges equal.** The General Assembly shall not grant to any citizen, or class of citizens, privileges or immunities which, upon the same terms, shall not equally belong to all citizens."

on the constitutionality of the statute under the Indiana Constitution, after hearing oral argument we certified the following questions to the Indiana Supreme Court in April 1975 pursuant to Rule 15N of the Indiana Rules of Appellate Procedure:

"1. Does the Indiana Guest Statute contravene Art. 1, §12 of the Indiana Constitution?

2. Does said Act contravene Art. 1, §23 of the Indiana Constitution?"

In an opinion received by us on April 8, 1976, that court answered both certified questions in the negative. 341 N.E.2d 763 [51 Ind. Dec. 246]. Consequently, we need only consider whether the Indiana guest statute violates the Equal Protection Clause of the Fourteenth Amendment.[4]

The statute challenged here discriminates against guests by denying them the right to sue for negligently inflicted bodily injury while affording that right to all non-guest passengers. Because the statutory classification is not inherently suspect (cf. *In re Griffiths*, 413 U.S. 717) and does not impinge fundamental rights (cf. *Memorial Hospital v. Maricopa County*, 415 U.S. 250), we need not strictly scrutinize the State purposes sought to be served. In the realm of social and economic regulation, the States are free to experiment and are given great latitude in determining who shall benefit from a particular enactment. *Lery v. Louisiana*, 391 U.S. 68, 71; *Dandridge v. Williams*, 397 U.S. 471, 485. Nonetheless, statutory classifications violate the Equal Protection Clause if they are not rationally related to "some legitimate, articulated State purpose." *McGinnis v. Royster*, 410 U.S. 263, 270; *Weber v. Aetna Cas. & Sur. Co.*, 406 U.S. 164, 172.

In its opinion responding to our certification, the Indiana Supreme Court stated that the purpose of this statute was to foster "hospitality by insulating generous drivers from lawsuits instituted by ungrateful guests and the elimination of the possibility of collusive lawsuits." 341 N.E.2d at 768. However, as noted in *Brown v. Merlo*, 8 Cal.3d 855, 506 P.2d 212 (1973), where the California guest statute was held unconstitutional under the Fourteenth Amendment, widespread liability insurance has eliminated any notion of ingratitude that may have formerly adhered to a suit by a guest against his host. 506 P.2d 221-222. 80 to 85% of Indiana residents carry liability insurance (United States Department of Transportation, Driver Behavior and Ac-

[4]The plaintiff argued preliminarily that since she was invited to ride by defendant, she was not a guest within the meaning of the Indiana statute. Since it is now settled that an invited automobile passenger is a guest under the Indiana Act, this argument must fail. See *Sidle v. Majors*, 341 N.E.2d 763, 774 [51 Ind. Dec. 246].

cident Involvement: Implications for Tort Liability, at 205 (1970)), whereas only 20% of all Americans were insured at the time of the passage of most of the guest statutes. Ellsberre and Roberts, Compulsory Insurance Against Motor Vehicle Accidents, 76 U.Pa.L.Rev. 690, 691 (1928). Indiana automobile owners have also had the benefit of a compulsory Financial Responsibility Law since 1947 (Ind. Code 9-2-1-15 (Burns' 1973)).

Brown also punctured the so-called anti-collusion purpose of a guest statute, for the guest and host can escape the bar of the statute by colluding on the issue of whether the rider provided any compensation for the ride (506 P.2d 226-227) or whether the host was guilty of wilful or wanton misconduct. Such odius perjury, often difficult to disprove, is encouraged by guest statutes. Nor is vexatious litigation avoided, for complaints are readily drafted to meet the statutory requirements. Thus we agree with the California Supreme Court in *Brown* (506 P.2d 225-227) that the relationship between the legitimate goal, the prevention of fraudulent actions, and the remedy, denying guests the right to sue, is so attenuated that it is unreasonable to eliminate causes of action of an entire class of persons merely because an indefinite portion of a designated class may file fraudulent lawsuits. See *Cleveland Bd. of Ed. v. LaFleur*, 414 U.S. 632, 655-657 (Powell, J., concurring).

One further reason the Indiana Supreme Court advanced in favor of the constitutionality of the guest statute was that otherwise there might be an escalation of automobile liability insurance premiums. But when the Guest Act was enacted in Connecticut in 1927, there was no reduction in automobile premiums, nor was there an increase in the premiums when that statute was repealed ten years later. Note, 42 U.Cinn.L.Rev. 709, 721 (1972). Defendant has not demonstrated that our invalidation of this statute would increase premiums for such insurance.[5]

Although we consider the foregoing considerations to be persuasive that this guest statute contravenes the Equal Protection Clause, under decisions of the Supreme Court of the United States we are required to affirm the judgment below.

Defendant's chief reliance is upon a 1929 Supreme Court decision where, without much discussion, the Court held that a similar Connecticut statute did not contravene the Equal Protection Clause. *Silver v. Silver*, 280 U.S. 117. However, the rule of that case has been so eroded by subsequent decisions (see, *e.g.*, *Vlandis*

[5]See *Manistee Bank & Trust Co. v. McGowan*, 232 N.W.2d 636, 645, n. 59. In note 9 of that opinion, the Michigan Supreme Court has collected an impressive array of critical comments with respect to guest statutes. For further such antipathy, see *Brown v. Merlo*, *supra*, 506 P.2d at 232, n. 22.

v. Kline, 412 U.S. 441) that it should no longer control under the Equal Protection Clause. *Silver* focused on whether the Connecticut statute could properly apply to motor vehicles as distinguished from other forms of transportation. The opinion did not consider whether the statute discriminated against a class of plaintiffs (280 U.S. at 123) and is therefore distinguishable.

As with the Indiana decision here, the *Silver* ruling relies on the notion that it is unfair to impose liability on the host and the fear that the courts will be inundated with troublesome lawsuits. At that time two factors supported the Supreme Court's decision to defer to the legislature's judgment on these questions. Widespread automobile use was still new and society needed time to develop methods of assessing the cost of the inevitable injuries. When the guest statutes are viewed as an initial attempt to cope with the problem, it was entirely proper for the Court to let the legislature make the decision. However, that is no longer the case. Liability insurance is a means by which the cost is borne by motorists as a class, not the individual driver. Further, experience teaches us that no fewer suits are filed by virtue of such statutes. The premises of *Silver v. Silver* being no longer valid in the light of modern authority, we believe that on plenary review the Supreme Court would not hold that *Silver* controls the question before us. See *Brown v. Bd. of Educ.*, 347 U.S. 483, 493-494.

Subsequent to *Silver*, appellate courts of eight States have declared their respective guest statutes unconstitutional under the federal Equal Protection Clause.[6] *Brown v. Merlo*, 8 Cal.3d 855, 506 P.2d 212 (1973); *Henry v. Bauder*, 213 Kan. 751, 518 P.2d 362 (1974); *Johnson v. Hassett*, 217 N.W.2d 771 (N.D. 1974);[7] *Thompson v. Hagan*, 96 Idaho 19, 523 P.2d 1365 (1974); *Primes v. Tyler*, 43 Ohio St.2d 195, 331 N.E.2d 723 (1975); *Laakonen v. The Eighth Jud. Dist. Ct.*, 538 P.2d 574 (Nev. 1975); *McGeehan v. Bunch*, 88 N.M. 308, 540 P.2d 238 (1975); *Manistee Bank & Trust Co. v. McGowan*, 394 Mich. 655, 232 N.W.2d 636. Their persuasive reasoning reinforces our belief that *Silver* is no longer to be followed.[8]

[6]Likewise, various courts have refused to apply other States' guest statutes. See the cases and authorities collected in Supplement to 2 Harper and James, the Law of Torts 47-48.

[7]The *Johnson* decision was based on three provisions of the North Dakota Constitution, one of which resembles the federal Equal Protection Clause.

[8]The State courts have not been unanimous. Recently the Supreme Courts of seven States have upheld their guest statutes despite challenges on equal protection grounds. *Behrns v. Burke*, 229 N.W.2d 86 (S.D. 1975); *Richardson v. Hansen*, 527 P.2d 536 (Colo. 1974); *Duerst v. Limbocker*, 525 P.2d 99 (Or. 1974); *Cannon v. Oviatt*, 520 P.2d 883 (Utah 1974), appeal dismissed for want of a substantial federal question, 419 U.S. 810; *Keasling v. Thompson*, 217 N.W.2d 687 (Iowa 1974); *Justice v. Gatchell*, 325 A.2d 97 (Del. 1974); *Delaney v. Bedame*, 49 Ill.2d 168 (1971).

Guest statutes were enacted during depression years to help the prevailing economic plight of the insurance companies that lobbied for their passage.* No such justification presently exists. Counsel for plaintiff has put it picturesquely: they are "an anachronistic monument to the insurance industry" (Br. 30). Today virtually only insurance companies win protection under such statutes.

The rationale that a guest statute favors hospitality falls here where plaintiff argues that she favored defendant, rather than vice versa, by agreeing to furnish him company as his passenger. The fact that she did not pay defendant is of no critical significance, for if Majors had injured a pedestrian or a guest in another's car, he would be liable for simple negligence. The hospitality rationale is also indefensible when contrasted with the judicial abrogation of interspousal, charitable and governmental immunities in order to provide a remedy for negligently injured persons.

Finally, the statute's lack of a rational basis is demonstrated by its denying automobile guest passengers the right to sue their drivers for negligently caused bodily injuries while permitting them to recover for negligently damaged personal effects. Such a statute denies them protection from negligent injuries. We can find no necessary rational relation to a legitimate State interest (*Reed v. Reed*, 404 U.S. 71, 75-76) that would require us to sustain the legislation.

Nevertheless a recent Supreme Court decision requires us to reach a contrary result. In *Cannon v. Oviatt, supra*, the Supreme Court of Utah rejected an equal protection challenge to a guest statute virtually identical to Indiana's. The appeal to the United States Supreme Court presented the question whether the guest statute violated the equal protection clause because it barred recovery for ordinary negligence. See 43 LW 3103. The Court dismissed the appeal for want of a substantial federal question. *Cannon v. Oviatt*, 419 U.S. 810. Although that ruling is not a plenary consideration of this significant current topic in tort law, it is an adjudication on the merits. *Hicks v. Miranda*, 422 U.S. 332, 344-345. Therefore, despite our doubts about the current validity of the rule in *Silver v. Silver, supra*, we are obligated to affirm. *Hicks v. Miranda, supra*, 422 U.S. at 345.

Although we are the first court of appeals to consider the equal protection challenge to a guest statute, the high courts of several States have already grappled with the problem, and the split among them has been noted (*supra*, pp. 5-6). Indeed the Supreme

Brown v. Merlo, supra, 225.

Courts of Nevada and New Mexico invalidated their State's guest statutes after the Supreme Court of the United States acted in *Cannon*. See *Laakonen v. The Eighth Jud. Dist. Ct., supra; McGeehan v. Bunch, supra*. The frequency with which the question has arisen and the disagreement among the courts attest to the importance of the issue, its difficulty and the need for conclusive resolution so that the present viability of *Silver v. Silver* can be authoritatively determined.

Judgment affirmed.

CONCURRING OPINION

FAIRCHILD, CHIEF JUDGE

As a matter of social policy, I have long rejected the propositions which underlie an automobile guest statute of the type we are now considering. See *McConville v. State Farm Mutual Automobile Ins. Co.*, 15 Wis.2d 374 (1962) (written by me as Justice of the Supreme Court of Wisconsin and changing a judge-made rule of law). I am, therefore, in agreement with the majority's criticism of the stated purposes of the guest statute. However, while I disagree with the choice of policy made by the Indiana Legislature in adopting this statute, I am unable to conclude that the reasons for enacting it are not rationally related to the classifications which the statute creates. A court is required to presume that the grounds for enacting legislation are rational, and I cannot state with the necessary certainty that in this instance the presumption has been overcome.